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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT A. HARPER,

Appellant,

vs.

LISA J. HARPER,

Appellee.

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No. 20A03-0503-CV-127

APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable David C. Bonfiglio, Judge

Cause No. 20D06-0407-DR-398

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert Harper (Father), pro se, appeals the trial court's denial of his motion for modification of visitation and the court's grant of Lisa Harper/Carlson's (Mother) motion to suspend visitation with respect to their daughter, A.H. He presents the following restated issue for review: Did the trial court abuse its discretion by failing to continue the evidentiary hearing to allow standby counsel to be present?

We affirm.

Mother and Father married in 1994, and A.H. was born to the marriage on April 4, 1996. During the marriage, as well as after, Mother suffered physical and emotional abuse from Father. In 1999, Mother filed for and obtained dissolution of the marriage in Elkhart Superior Court 2, while Father was incarcerated for a cocaine offense. Mother was granted legal and physical custody of A.H. Once out of prison, Father sought to establish visitation. The court granted Father supervised visits with A.H. at Child Abuse Prevention Services (CAPS), which began in September 2000. Thereafter, in March 2001, Father filed a motion for unsupervised visitation. Pursuant to agreement of the parties, visitation was subsequently modified and, beginning April 21, 2001, Father was granted visitation with A.H. at the parental grandparents' home for a specified period of time every other Saturday.

Later that year, Father murdered a rival drug dealer. He was convicted on October 4, 2001 and was sentenced to sixty-five years in prison. Out of fear, Mother took A.H. to the prison five times to visit with Father. The last visit was in April 2002. Mother stopped taking A.H. to visit Father because the visits were negatively impacting her young daughter.

On July 21, 2003, Father filed a motion to modify visitation. Mother subsequently filed, on August 13, a motion to suspend visitation, which the trial court granted pending a hearing. This cause was transferred to Elkhart Superior Court 6 in July 2004, along with one or two other causes. One of these additional cases (the adoption case) involved the adoption of Father's two older children, whom he had with his first wife, Jennifer Kaufman. In the adoption case, Kaufman's current husband sought to adopt the children without Father's consent.

On October 19, 2004, the trial court held a status hearing to determine what matters were pending with respect to each case. Father, acting pro se, participated by telephone from the prison. The parties and the court initially addressed the visitation case involving A.H. Father clearly indicated that it was his intention to represent himself, despite the court's misgivings and the court's offer to appoint an attorney for Father. The trial court set the visitation case for an evidentiary hearing on January 28, 2005. The court then set a hearing regarding the issue of the paternal grandparents' visitation for February 25. Thereafter, the adoption case was addressed and set for hearing in March.

In an order issued immediately following the status hearing, the trial court stated in pertinent part:

The Court specifically reviews with Mr. Harper the Court's authority to appoint him counsel as he is indigent. He indicates he will proceed pro se. The Court does advise him that there are complexities to the Rules of Trial Procedure and the Rules of Evidence. He is advised that if he changes his mind, he should petition the Court for appointment of counsel.

Appendix at 86.¹

Six weeks later, on November 30, Father filed a petition for advisory counsel. Father suggested Christopher Crawford or Elizabeth Tate as possibilities in that they had “served as counsel for the Father in these proceedings since 1993.”² *Id.* at 87. In the petition, Father then stated:

5). That the Father represented himself *pro-se* in an eight hour jury trial (#20D04-9607-CM-678) on two criminal charges, and was rightfully acquitted:

6). That the Father request [sic] all filings and notices be sent to him, and that no notices or filing be sent to the appointed counsel *in lieu of* the Father:

7). That the Father does not consent to the appointed counsel submitting any filings, nor speaking on his behalf:

WHEREFORE, the Father, request [sic] the Court appoint Counsel solely to serve in an advisory manner throughout the proceedings.

Id. at 87-88. Father also sought appointment of advisory counsel with respect to the other pending causes, including the adoption case.

Thereafter, in a handwritten letter to the trial court dated December 27 and filed December 29, Father inquired about several matters, including his petition for advisory

¹ The CCS regarding the status hearing similarly noted:

Court specifically reviews with Mr. Harper Court’s authority to appoint him counsel as he is indigent. He indicates he will proceed PRO SE. He is advised if he changes his mind he should petition the Court for appointment of Counsel.

Id. at 4.

² In this regard, it appears that Father is referring to representation in both of his prior dissolutions (that is, the dissolution involving Kaufman and the one involving Mother). From our review of the record, it is apparent that Crawford had represented Father regarding visitation with A.H. as recently as August 2001.

counsel.³ Father asked, among other things, to be informed of the court's ruling regarding his petition and in a postscript urged, "Please do not grant any continuances in this 18 month old case." *Appendix* at 89. In another handwritten letter to the court, dated January 11 and filed January 13, Father once again indicated that he lacked notice of the court's ruling with respect to his petition for advisory counsel, as well as several other matters. Despite claiming that he was "severely handicapped" without the rulings, Father did not seek a continuance of the hearing scheduled for January 28. *Id.* at 91.

On January 24, Christopher Crawford agreed to act as advisory counsel for Father in the pending cases. Crawford, however, was not available for the hearing on January 28. Father was transported from prison for the visitation hearing. At the beginning of the hearing, the following discussion took place:

[COURT]: This evidentiary hearing has been a year and half in coming and it is certainly about time to get the evidence on the record for the Court to be able to make some decisions here.... In regard to having counsel to assist you, on October 18 [sic], I indicated to you I'd be certainly willing and ready to give you appointed counsel. About five weeks later, you indicated that you wanted standby counsel. Certainly taking the—all this time to find an attorney that's willing to take your case as standby and you have a prior relationship with the gentleman and again, I'm going to leave the—because you have a prior relationship with him, I guess, I need to know if you agree have [sic] him. That's Christopher Crawford. I believe he represented you.

[FATHER]: Yes.

[COURT]: And he felt his view was he had a good relationship with you, if you're willing to do it.

[FATHER]: Yes.

³ Apparently, this letter was just one among many filed by Father. The trial court took particular note of Father's voluminous filings and warned that Father had unrealistic expectations of the court system and that filing the "same things over and over and over" was not helpful. *Transcript* at 5.

[Court]: If you were agreeable to that. Obviously, he's not here today and so we're going to proceed today with you being pro se and I will appoint Mr. Crawford on your other case—the, certainly the adoption case and your rights there are—are termination issues is certainly significant and that would certainly be extremely appropriate for you to have counsel to assist you.

But today we are going to hear the evidence concerning the issue of visitation contact with [A.H.]...

Transcript at 7. Father did not request a continuance or object to proceeding without advisory counsel. After summarily rejecting as absurd Father's motion for protective order against mother to have no contact with A.H. and then discussing and dismissing Father's motion for rule to show cause, the trial court stated: "So we're here to decide the issue of this child's contact with [Father]. That's the issue for today." *Id.* at 10. Father responded, "Good." *Id.*

After some confusion regarding how to admit exhibits, Father stated, "That's why I asked for advisory counsel". *Id.* at 13. The following discussion then occurred:

[COURT]: Well, that's why you told me on October 18 [sic] you didn't need advisory counsel, that you were working very hard on this and you had lots of experience and I questioned you for—fairly well about that issue and you felt very confident to go forward. You did ask me six weeks later, five weeks later for advisory counsel and I've already covered that issue.

[FATHER]: Yes.

[COURT]: And so we are going forward today. Do you have evidence you wish to present?

[FATHER]: Well, things are getting little [sic] bit uncertain for me. As I understand what you are telling me, I need to call and swear a witness in before I can refer to any of my exhibits. Is that correct?

[COURT]: That's what I said....

Id. Father then called his first of several witnesses.

While examining Mother, his sixth witness, Father made his first request for a continuance. After he had difficulty admitting an exhibit, Father stated, “I think that maybe we should go ahead and adjourn this hearing and get me counsel here so I can do this properly.” *Id.* at 55. The court denied Father’s request and explained, once again, that a witness has to identify and authenticate a document before it can be admitted as an exhibit.⁴ With this advice, Father continued presenting his case and eventually entered a number of exhibits into evidence.

Father later sought to admit into evidence the CAPS reports of his supervised visits with A.H. from September 2000 through April 2001. He designated these eleven exhibits as TT through DDD (the CAPS exhibits). Mother’s counsel, however, objected to the admission of these exhibits on hearsay grounds. The trial court sustained the objection but noted that there were “certainly methods of getting it admitted into evidence”. *Id.* at 115. The following colloquy then occurred:

[FATHER]: Your honor, Exhibit TT through DDD, I really need to know what that method is entering these into is [sic] and if we need to adjourn and come back, I’m willing to do that and get—and get my advisory counsel to instruct me because I don’t know how to do it. I’m not a professional on this. If your furnace isn’t working, your air conditioner isn’t working, I’m your man but when it come to law, I’m just fighting for my little girl.

[COURT]: Well, you know, as—as I said you had adequate opportunity to ask for counsel and I offered it to you and you indicated your ability to do this proceeding. I guess, you know, it’s—these items are already filed with the court. There’s certainly, as I said, a method of getting them admitted, having them authenticated by the

⁴ Mother’s counsel had also explained to Father that “if [he] laid appropriate foundation, have her identify those as her written documents, I’d agree to those documents being admitted into evidence.” *Id.* at 54.

person that—who wrote them but, at this point, counsel has made appropriate objection and I have sustained it. Do you have any other questions for this witness?

[FATHER]: I have two questions for you, if I may, about this issue. Can I ask for copies of the CAPS reports to be brought from the file that I may refer to? Can I do that? Let the Clerk get these out of the file and bring them to us.

[COURT]: The file is on my—on the bench.

[FATHER]: Okay. Could you refer to...

[COURT]: No.

[FATHER]: ...September—September 20, 2000, filing?

[COURT]: No. You're—you're trying to put the Court into the position of being your counsel and I can't do that. The file, the entire—this cause is before the Court for evidentiary hearing. The Court has the Court's case file at the bench.

[FATHER]: Well, your honor, I'm assuming that you probably want to take a lunch break soon. Would it be possible that during your lunch break that you allow me to speak to one of the Public Defenders here for just a few minutes and ask them for some assistance.

[COURT]: That's not their job. The Public Defenders are for criminal cases. As I said—I—I said earlier I'm willing to appoint you standby counsel. It took me until this week to find a lawyer that was willing to do that. So, no, you can't talk to a Public Defender or the Public Defender's office. Any other questions for this witness on redirect?

Id. at 115-17. At the conclusion of the evidence, Father once again raised the issue of the CAPS exhibits:

[FATHER]: Your honor, I'd like to request that—that you call—that we take a break and being that I—I did file for a petition advisory [sic] counsel November 29 and I did suggest in that petition that Chris Crawford would be reasonable alternative for attorney for me and I didn't hear anything back, I've written several letters asking about that and not heard anything back and I haven't been afforded, I don't believe, the opportunity to adequately represent myself because I didn't have an attorney so I'm—I'm asking you if you would please take a break and call CAPS, Child Abuse Prevention Services at Elkhart and ask for Dolores Merrick—Dolores Merrick, if it is her su—signature on these exhibits marked TT through Exhibit DDD that indicates that our visitation—my visitation between my daughter and I, regardless of all of my mistakes, my criminal

actions, my turbulent marriage, these state—these—these statements from these—these feedback forms show that I’m able to be on my best behavior and show my daughter nothing but love and acceptance. And each one of them is signed by Dolores Merrick and each one of them is entered into this court’s record between August—between September 20 and—of 2000 and—and April of 2001. Would you please call her and ask her if these are her signatures on these documents that I may enter them into evidence.

Id. at 171. The court denied Father’s request, and the parties proceeded with their closing arguments. During his closing, Father once again referred to the CAPS exhibits as “evidence of [his] appropriate interaction” with A.H. *Id.* at 177.

On February 14, 2005, the trial court denied Father’s motion for modification and granted Mother’s motion to suspend visitation. In its thirteen-page order, the court entered extensive findings and conclusions. In sum, the court concluded:

The Court finds that visitations between the father and the child will endanger the child’s physical health and significantly impair the child’s emotional development. Specifically, the child has several mental health disorders including attention deficit disorder with hyperactivity, an anxiety reaction disorder with some oppositional features and could develop depression and post-traumatic stress disorder. That she is a fragile child and that to expose her to her father in any setting, even if it be in at [sic] [CAPS] would worsen her condition. If the father was not in prison for murder, the extensive, long term physical and emotional abuse in the home which the child experienced would justify not allowing the father to visit the child. That [A.H.] could lapse into further and deeper emotional trauma-depression and post traumatic stress disorder if she is exposed to her father. That upon seeing the father, the child remembers the violence he perpetrated on the mother and the murder the father committed. The same are emotionally damaging to her and she is experiencing problems with school work, problems with social relationships and she is a very fragile child who need [sic] to have intensive assistance and care.^[5]

⁵ The trial court also specifically found that A.H. has nightmares about Father, is very fearful of him, and does not want to see him.

The possible damage to the child's physical condition is that the father could, in fact, physically harm her. He is capable of great rage, as he has demonstrated in the past. That is, he has murdered an individual with a club, broke another inmate's nose while in prison, nearly strangled [Mother] and has used broken furniture against the mother. That even in a prison visiting room, without physical restraint, the child cannot be totally protected from his violent outbursts.

The Court further determines it is in the best interest of the child to modify visitation by eliminating it based upon the Court's findings of fact.

Appendix at 21-22. Father now appeals. Additional information will be provided below as necessary.⁶

While much of Father's pro se argument on appeal is difficult to decipher, at the heart, Father claims the trial court abused its discretion by failing to continue the trial so that standby counsel could be present to assist him.⁷

The grant or denial of a motion for a continuance is within the sound discretion of the trial court. *J.M. v. Marion County Office of Family & Children*, 802 N.E.2d 40 (Ind. Ct. App. 2004), *trans. denied*. Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each circumstance. *Id.* A decision on a motion

⁶ We note that in Father's Statement of Facts he often relies on "facts" that are not found in the record. For example, he cites the "I.S.P. daily legal mail log" to support his assertion that he did not receive the October 19, 2004 order, in which the court offered to appoint counsel, until November 19, 2004. *Appellant's Brief* at 2. We will not consider arguments based on facts that are outside the record.

⁷ Father also appears to argue that the court was somehow contractually bound to provide counsel. This argument is not supported by cogent reasoning and is entirely without merit. Further, Father's bald assertion that his Sixth Amendment rights were violated is similarly without merit. We note that Father, as a party in a civil cause of action, has no Sixth Amendment rights to violate. *Bowman v. Smoot*, 806 N.E.2d 811, 816 (Ind. Ct. App. 2004) ("the protections provided by the Sixth Amendment are available only in criminal prosecutions"). Moreover, not even criminal defendants are constitutionally entitled to standby counsel. *See Sherwood v. State*, 717 N.E.2d 131, 135 n.2 (Ind. 1999) ("a defendant who proceeds pro se has no right to demand the appointment of standby counsel for his assistance"); *Kindred v. State*, 521 N.E.2d 320 (Ind. 1988).

for continuance will be reversed only upon a showing of a clear abuse of discretion and prejudice resulting from such an abuse. *Id.*; see also *Homehealth, Inc. v. Heritage Mut. Ins. Co.*, 662 N.E.2d 195, 198 (Ind. Ct. App. 1996) (“denial of a motion for continuance is an abuse of discretion only if the movant demonstrates good cause for granting the motion”), *trans. denied*.

Our supreme court has observed that an abuse of discretion consists of an “evaluation of facts in relation to legal formulae. In the final analysis, the reviewing court is concerned with the reasonableness of the action in light of the record.” *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001). Thus, the trial court’s ruling should be set aside only if it is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable and actual deductions to be drawn therefrom. *Id.* Finally, while the facts and reasonable inferences in certain instances might allow for a different conclusion, we will not substitute our judgment for that of the trial court.

J.M. v. Marion County Office of Family & Children, 802 N.E.2d at 44.

It is clear that Father was determined to act as his own counsel in this cause, as well as the other pending actions before the trial court, and that he envisioned advisory counsel playing an extremely limited role. Further, after the trial court cautioned Father about pro se representation and offered to appoint counsel for him, Father waited six weeks to petition for advisory counsel. While Father wrote two letters to the court inquiring about its ruling on the petition, Father never sought a continuance prior to the hearing. In fact, in a letter sent one month before the hearing, Father expressly urged the court not to grant any continuances.

On January 24, 2005, four days before the visitation hearing, Crawford informed the trial court he was willing to act as advisory counsel for Father in the pending cases.

On that same date, the trial court dictated a letter to Father in this regard. Crawford was apparently not available for the upcoming hearing but would be available for the adoption hearing.

Father, a convicted murderer, who had yet to seek a continuance, was transported from prison for the hearing on January 28, 2005. As set forth above, Father fully intended to represent himself at the hearing and (erroneously, it turns out) believed he had the skills to do so. At the beginning of the hearing, as set out in detail above, the trial court explained to Father the circumstances regarding advisory counsel. The court noted that the visitation matter had been pending for a year and a half. Further, the court specifically indicated that it was going to have Father proceed pro se at the instant hearing without the assistance of advisory counsel but that the court would appoint Crawford as advisory counsel for the adoption hearing (involving the involuntary termination of Father's parental rights with respect to his two older children).

Even after this pronouncement from the trial court, Father did not request a continuance or object to proceeding without advisory counsel. Rather, the record reveals that Father willingly commenced with the presentation of his case⁸ and did not request a continuance until he encountered difficulty admitting exhibits during the direct examination of his sixth witness. At that point, the trial court, as well as Mother's counsel, generously offered Father guidance regarding the admission of documentary evidence. The court, however, denied Father's belated request for a continuance. Under

⁸ In fact, when the trial court stated, "we're here to decide the issue of this child's contact with [Father]", Father responded, "Good." *Transcript* at 7.

the circumstances, we cannot conclude that the trial court abused its discretion in denying Father's request for a continuance, which Father did not seek until the middle of the hearing after encountering the perils of pro-se representation of which the trial court had warned. *See In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1206 (Ind. Ct. App. 2002) ("moving party must be free from fault and show that [his] rights are likely to be prejudiced by the denial").

Moreover, while not necessary to our decision, we feel compelled to address Father's primary claim of prejudice. Father claims he incurred irreparable harm because he was unable to admit the CAPS exhibits into evidence without the assistance of advisory counsel. He asserts that this evidence, which he attempted to admit on multiple occasions, was his "foundational evidence" and its absence "completely sabotaged [his] offensive strategy." *Appellant's Brief* at 13. He claims further: "These expert visitation evaluations would have been sufficient to convince any highly skeptical, but reasonable, person, or Court, that visitation was in the child's best interest." *Id.* at 17 (citation omitted).

Despite the court's rulings regarding the CAPS exhibits that Father unsuccessfully attempted to admit at the hearing, in its subsequent order, the court expressly took judicial notice of these reports, which were "addressed to the Judge of this case and the Judge in a companion case". *Appendix* at 14. The court addressed the reports further in its findings:

That nearly four years have passed since the visits at Child Abuse Prevention Services (CAPS) and that the child is less stable and has

identifiable mental health disorders. That the child's mental health is more precarious at this time.

That the visits at [CAPS] included her older half siblings...and those visits included the providing of "Happy Meals" and assorted gifts. That visits at the Indiana State Prison would be significantly different for the child and any comparison with the visits at CAPS is not justified.

Id. at 17. Father's claim of prejudice in this regard, therefore, fails because it is apparent the trial court ultimately considered the proposed CAPS exhibits, but found them to be of little evidentiary value with respect to the visitation issue at hand.⁹

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.

⁹ Father's other claims of prejudice essentially amount to an acknowledgment that he did a poor job representing himself. Such was the risk he accepted in choosing to proceed pro se, despite the court's offer of appointed counsel. He cannot now be heard to complain.